

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

A&E TELEVISION NETWORKS, LLC : Docket #:  
Plaintiff, : 1:22-CV-07411-kpf  
-against- :  
BIG FISH ENTERTAINMENT, LLC, : New York, New York  
et al., : October 27, 2022

Defendants.

-----:Pre-motion Conference

PROCEEDINGS BEFORE  
THE HONORABLE KATHERINE POLK FAILLA  
UNITED STATES DISTRICT

APPEARANCES:

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1                   THE CLERK: Your Honor, this is in the  
2 matter of A&E Television Networks, LLC, v. Big Fish  
3 Entertainment, LLC, et al.

4                   Counsel, please state your name for the  
5 record, beginning with plaintiff.

6                   MR. YOHAI: My name is David Yohai. I'm  
7 here with my colleagues, Randi Singer and Fredrick  
8 Rhine for the plaintiff, A&E Television Networks.

9                   THE COURT: Good morning, sir, and good  
10 morning to each of your team. This is Judge Failla.  
11 Thank you.

12                  Representing the defendants this morning,  
13 please.

14                  MR. SNYDER: Good morning, Your Honor. It  
15 is Orin Snyder from Gibson Dunn representing the  
16 defendants, accompanied by my colleagues, Ilissa  
17 Samplin and James Pinchak.

18                  THE COURT: Thank you. And good morning to  
19 each of you as well.

20                  This is our initial pretrial conference in  
21 the case, and based on some submissions I've  
22 received from the parties, I understand that it is  
23 as well a premotion conference.

24                  Mr. Yohai, part of the reason that I have  
25 pre-motion conferences is to see whether the

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1 nonmoving party believes that there is an amendment  
2 to his or her pleadings that might obviate some of  
3 the bases for a motion. In this case, I'm not sure  
4 that there is, but I did want to hear from you as to  
5 whether it was your current intention to stand on  
6 the existing pleading or whether it was your  
7 intention to seek leave to amend.

8 MR. YOHAI: Your Honor, it is our intention  
9 to stand on the existing pleading at this point.

10 THE COURT: Okay. Then I won't be asking  
11 you about how you'd like to amend it.

12 Sir, I do want to hear from Mr. Snyder  
13 because he represents the moving parties in this  
14 case. But before I did so, I do think I want to  
15 understand perhaps a little bit better than I do as  
16 a result of reading the party submissions, what  
17 specifically your clients believe are protectable  
18 components of the show that have been violated or  
19 infringed upon by the defendant's show. So  
20 recognizing that I am to consider things  
21 holistically, I still want to understand precisely  
22 what you believe is protectable.

23 MR. YOHAI: Your Honor, a few things I  
24 would say. First of all, this is an atypical case,  
25 in that it is not a case where we just have a

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1 treatment against the show that actually aired.  
2 This is a case where the defendants marketed the  
3 show as bringing back our show, and that is bringing  
4 back the entirety of our show.

5 Why is that? Because they are using not  
6 just three hosts in the studio, they're using the  
7 same three hosts in the studio.

8 Why is that? Because they're not just  
9 doing prepackaged segments. They're using the same  
10 prepackaged segments, Crime of the Week, The Wanted  
11 segment.

12 Why is that? Because they're not just  
13 using any police departments, they're using many of  
14 the same police departments.

15 And so, Your Honor, when you look at this  
16 show in its totality, it is a clone of our show.  
17 And so to the extent that the show had any  
18 copyrightable interest at all, which we clearly  
19 believe it did, since they assigned to us all  
20 copyrights and trademarks, this is our show. Every  
21 element of the show is the same. They've made no  
22 effort to change anything. And that's the problem  
23 here. And that's why we think it is protectable in  
24 terms of the entire look and feel of the show. It  
25 looks the same, it feels the same, the pace of the

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1 show is the same. Dan Abrams is using the same  
2 language when he introduces the segments. They've  
3 taken our same hosts, and the entire show feels the  
4 same. So that's why we think, if anything, it's  
5 protectable. It has to be this, otherwise the  
6 copyright laws would have no meaning since they took  
7 the entirety of the show.

8 THE COURT: All right. Please pause right  
9 there, sir. Thank you.

10 I'm not sure that I would be finding in  
11 your favor based on the pace of the show. So I  
12 think we should put that one to the side. Are you  
13 suggesting that the titles -- I think you are, but I  
14 want to understand this -- that the titles are  
15 somehow confusingly similar.

16 MR. YOHAI: Your Honor, we think when they  
17 advertised that they were bringing back our show,  
18 meaning when they said Live PD is back as On Patrol  
19 Live, that they were intentionally trying to create  
20 the confusion between the two shows. We recognize  
21 that the word "live" in and of itself is  
22 descriptive. But in this context, where they're  
23 saying we are bringing back the show, we do think  
24 it's confusingly similar. And if you look at all  
25 the factors, not just the word "live", but all of

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1 the factors, there's evidence of consumer confusion.  
2 There's evidence that they were intentionally trying  
3 to confuse the two shows to trade on our goodwill.

4 And this was deliberate. They knew that  
5 our show was a big success. We wouldn't be here if  
6 they had created another show called, for example,  
7 Police on the Beat and had different hosts, and --  
8 for example -- I'll give you another example. Cops  
9 was a prior show that exists. Cops doesn't have any  
10 hosts in a studio, and they certainly don't have Dan  
11 Abrams and Sticks Larkin doing the show, and they  
12 certainly don't have Crime of the Week. The cops  
13 themselves are narrating the action.

14 We wouldn't be here if this was just any  
15 police show. We're here because they are  
16 specifically trading on us. And also, On Patrol is  
17 not even unique to them since we had a derivative  
18 work called On Patrol. So we think the collective  
19 of what they've done here does, in fact, both  
20 violate our copyrights and our trademarks.

21 THE COURT: All right. I mean, I  
22 appreciate, sir, that no matter what I ask you,  
23 you're going to tell me that I should consider these  
24 things in their totality. But is it really the case  
25 that as a result of the agreement that you had with

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1 the defendants, that Mr. Abrams and his colleagues  
2 could never appear on another show of this type? Or  
3 is it simply that they could never appear on another  
4 show that Big Fish did? I mean, I'm trying to tease  
5 this out as to what precisely is the protectable  
6 element?

7 Is your problem that Big Fish conscripted  
8 the same hosts or involved the same hosts? I mean,  
9 if Mr. Abrams and others had gone to another entity  
10 and done all of this, would that still be a  
11 violation, you believe, of your copyright  
12 protections?

13 MR. YOHAI: Well, Your Honor, if Dan Abrams  
14 had gone to another entity and they didn't link it  
15 to our show and say we were bringing back our show  
16 back and they didn't hire not just Dan Abrams, but  
17 they hired Sticks Larson, and they hired a third  
18 host who was on our show, and -- Your Honor, and  
19 they didn't have the exact same segments that they  
20 have in our show, and they didn't have the exact  
21 same flow of the show, you know, where they're  
22 opening in the studio and then they're cutting to  
23 the same police departments, if any of these things  
24 were different or they made any attempt to make this  
25 different, that would be potentially a new -- a new

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1 work. But they didn't. What they really did was  
2 they said, we have a great idea. Let's just steal  
3 this show and put it on their network and trade in  
4 on our goodwill. We're not trying to tie up Mr.  
5 Abrams or Mr. Larkin permanently, but we're just  
6 suggesting that if they're going to do a new show,  
7 it ought to be a new show, not our clone show.

8 THE COURT: All right. Please understand,  
9 I did, in fact, preface my question by asking you to  
10 disaggregate things. And again, you aggregated  
11 things. So perhaps, no matter what question I ask,  
12 you're going to aggregate things. But I am trying  
13 to figure out precisely what is the protectable  
14 elements, and you just keep telling me the  
15 agglomeration of them is the set of protectable  
16 elements.

17 So -- all right. Mr. Snyder, let me speak  
18 to you, please, sir. Because it is you who wishes  
19 to make the motion. I'm fairly confident that I'm  
20 not going to be able to persuade you not to make the  
21 motion. But having now seen the submission from  
22 plaintiff's counsel that was filed last evening, let  
23 me hear your reactions to it. Thank you.

24 MR. SNYDER: Thank you, Judge. And I will  
25 give you my reactions to the submission and also to

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1 the comments we just heard.

2 Let me start in proximity to the comments  
3 we just heard. And able counsel, whom I respect,  
4 did his best to defend the complaint, but his  
5 comments, I think, confirm and buttress the  
6 dismissibility of this case under Rule 12(b) (6).

7 Counsel said this was an atypical case.  
8 It's a very typical case in the television industry  
9 involving unscripted or reality TV where there is a  
10 contractual arrangement, such as the one Your Honor  
11 referred to, that has with it a one-year embargo or  
12 some period of embargo where there is a period of  
13 repose during which the owner or the creator of the  
14 program can't shop it to another network. And what  
15 happened here, of course, is A&E's consent was  
16 required before Big Fish could shop another  
17 unscripted live police show to another network,  
18 which gave A&E one year to figure out what business  
19 decision it wanted to make with respect to the  
20 program and under the contract. In fact, Live PD  
21 ended in 2020 and the one-year embargo period  
22 commenced and A&E made a business decision to let  
23 the one-year embargo, right, it had against my  
24 client lapse. And then we went, as we're allowed to  
25 under the contract, and contracted for future shows

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1 on the new network.

2           The contract explicitly allows Big Fish to  
3 do this. It says that we are free after a year to  
4 produce another show, "substantially similar in  
5 content and format to the Live PD series." So this  
6 is standard in the industry, whether it's Project  
7 Runway going to another network or whether it's a  
8 Live Police show. And so that was a business  
9 decision that A&E made not to contract for future  
10 shows on this format similar. And it's not a  
11 coincidence that the contract says substantially  
12 similar because, of course, that is copyright  
13 language. And so it was clear under the contract  
14 what the parties intended. You can do a clone show.  
15 What we can't do is use the copyrightable material  
16 that A&E owns, which is the footage and the other  
17 music and the other elements that are original to  
18 the film of the A&E show.

19           And so there's no contractual breach claim  
20 because we did what we were allowed to do once we  
21 became a free agent. And Your Honor is right. I  
22 mean, under their theory, Dan Abrams and Big Fish  
23 can never produce and sell another reality show  
24 about cops on the beat. And no one owns a copyright  
25 in the concept of a live unscripted police show.

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1                   And as I'll now respond directly to the  
2 letter, all of the elements that they say are  
3 protectable individually or even in the aggregate  
4 are stock concepts for an unscripted police show far  
5 from original. And in the letter they say we  
6 cherrypicked what were the stock generic scène à  
7 faire. And then they provide four to your Honor,  
8 which they say is their kryptonite against  
9 A 12(b)(6) dismissal. But if you look at the four  
10 that they highlight as their greatest hits of  
11 original expression, each is patently insufficient  
12 to get by 12(b)(6) under the case law in this  
13 circuit. And this circuit has perhaps the best  
14 developed case law in the country on how to look at  
15 copyrightable and non-copyrightable material.

16                   And of course, Your Honor, just recently,  
17 maybe one of the most recent decisions in the  
18 circuit on this issue wrestled with this in the  
19 Walkie Check Productions case with -- against  
20 Viacom. And so here, before they highlight, confirm  
21 that this case is ripe for dismissal. First, they  
22 say they have the same hosts dressed the same way,  
23 using the same catchphrases. Well, A&E doesn't own  
24 a copyright in Dan Abrams as a television host. Dan  
25 Abrams' clothing, which is pretty, as well dressed

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1 as he is, unremarkable. They don't -- I'm not just  
2 saying they own copyrights in the design of his  
3 suit, but they're not in the clothing business.

4 If they want to non-compete, preventing Dan  
5 Abrams from going to a different network, they could  
6 have bargained for that, as they bargained for the  
7 one-year embargo. They didn't. And as far as the  
8 way they're dressed, the screenshots referenced in  
9 the complaint actually show the hosts wearing  
10 completely different clothing. But of course, no  
11 one owns a copyright in jeans and jackets and  
12 T-shirts and button down shirts and black T-shirts.

13 Catch phrases, I don't know what that  
14 means. They don't identify any original verbiage or  
15 expression that is claimed to be owned by anyone.  
16 And no one has exclusive rights over slogans and  
17 phrases common to the English language. Again, I  
18 don't know what they mean by catch phrases, and it's  
19 really not actionable.

20 That was their first example of original  
21 protective elements. And that doesn't get out of  
22 the batter's box, certainly not even close to first  
23 base. The second one, they say it uses some of the  
24 same segments. And the examples they give are  
25 Missing, Wanted, Crime of the Week. Now Missing and

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1       Wanted have been on signage from the Wild West to  
2       milk cartons, sheriff's posters, and in fact, I  
3       think there have been shows with those titles. It's  
4       hard to imagine anything more generic in the concept  
5       of policing and crime than Missing and Wanted. They  
6       go hand in glove. No one owns the right, under  
7       copyright or otherwise, to use those *scène à faire*  
8       words that are -- it would be like a show about a  
9       graveyard, and you can't use the word mourner or  
10      tombstone. I mean, it's that silly. Every police  
11      department in the country has a wanted list. Every  
12      police department in the country has a missing  
13      persons list. So that's their second.

14           The third is that defendants follow the  
15      same police departments and officers, but no one  
16      owns the copyright to a specific police precinct any  
17      more than someone owns a copyright and a show about  
18      the Empire State Building or what tourists do when  
19      they go there. And what's ironic about that  
20      argument, which is their third of four, is that  
21      perhaps the seminal case in this area, the one that  
22      I knew when I was much younger because it's been  
23      around for a while, is Judge Feinberg's decision in  
24      Walker vs. Time Life Films. And the irony of that  
25      decision is it involved police department, the 41st

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1       Precinct in the Bronx.

2                  In that case, the author of a book titled  
3       Fort Apache sued the producers of a movie called  
4       Fort Apache the Bronx for copyright infringement.  
5       The District Court -- I can't remember which  
6       judge -- dismissed it -- Edelstein. Actually, it  
7       was Judge Edelstein, I remember, dismissed it. And  
8       Judge Feinberg authored a decision saying that the  
9       book and movie both depicted police officers in the  
10      same precinct in the Bronx, and every element from  
11      the vermin to the drug dealers and the pimps and  
12      everything else were all scène à faire. And so that  
13      argument, I think, goes nowhere.

14                 And A&E knows the Port Apache case. And  
15      this is not a "tit for tat" or "gotcha", but A&E is  
16      usually on the defense side of these cases because  
17      A&E is a flagship network, and they regularly argue  
18      in this court and elsewhere exactly what we're  
19      arguing here, which is our shows do not infringe  
20      anyone. And they cite all the same cases that we're  
21      citing now. And in fact, just recently, A&E  
22      affirmed this principle in a brief in the Married at  
23      First Sight case arguing, "foot cases and the morale  
24      problems of policemen are common concepts and not  
25      protectable."

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1                   So all the elements on the new show that  
2 A&E claims were copied from the old show are like  
3 police foot chases; they're tropes and generic two  
4 shows on policing. And it's not a coincidence,  
5 therefore, given our fascination with crime and the  
6 association of crime and police with our creative  
7 mediums dating back to radio shows, and well before  
8 that, we've identified 30 shows, at least, that  
9 depict real police officers on the job Cops, Lone  
10 Star Law, Alaska State Troopers. The Court can take  
11 judicial notice of all of those and compare and  
12 contrast and they all basically are "clones," of one  
13 another.

14                  And so the final argument they make in  
15 their opposition letter, your Honor, is they say  
16 that our show is the first show in television  
17 history to feature law enforcement activity in real  
18 time in such a sustained fashion. (A), I don't know  
19 what that means, but (B), if I interpret it to mean  
20 really fast, live depiction of cops, that's old,  
21 tried and true. MTV had a special of which the  
22 Court can take judicial notice called Busted Live  
23 that aired eight years before Live PD. It was a  
24 live show that followed real time police patrols in  
25 a similarly sustained dynamic fashion. And if

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1 that's not enough, this Court can take further  
2 judicial notice and we will provide the Court with  
3 all this material in our motion of Border Live,  
4 which filed law enforcement in border states on the  
5 Discovery Channel in 2018, and First Responders  
6 Live, which filed law enforcement on Fox in 2019,  
7 all airing contemporaneously with Live PD. These  
8 two shows, like the A&E show, all had the same  
9 hallmarks of unscripted police show, commentators in  
10 a studio, narrating law enforcement activity in the  
11 field in real time. And A&E chose not to sue  
12 Discovery or Fox. And so we think that finding  
13 refuge in the, "total concept and overall feel,"  
14 which is where A&E goes, is the last refuge of every  
15 deficient copyright claimant. A concept is not  
16 copyrightable. A&E can't claim exclusive rights  
17 over otherwise unprotectable generic elements by  
18 wrapping them in a bow and calling it an overall  
19 totalistic feel. Standing alone or taken together,  
20 their alleged original elements are unprotectable as  
21 a matter of law. And so I just want to close by  
22 going back to where I started, which is the  
23 contract. And what they bargained for during the  
24 party's negotiations, which makes this case actually  
25 easier to decide, was a one-year embargo, as I said.

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1 And this was beneficial to both parties. It ensured  
2 that for this one year, they both have time to  
3 negotiate about "a substantially similar look and  
4 feel and format; a clone." And ensured that for  
5 this one year, A&E having invested its time and  
6 money on the show, would have a period of repose.  
7 But once that expired, we were a free agent. Free  
8 to work with Reelz or anyone else on, yes, a new  
9 unscripted police show. And that's exactly what we  
10 did. And that's why they have no redress.

11 And the reason for this one-year embargo is  
12 it reflects the commercial reality, the recognition  
13 in the industry that you can't copyright generic  
14 elements of an unscripted show about cops on the  
15 beat. That's why they needed to create a  
16 contractual repose, because without that, we would  
17 have become an immediate free agent.

18 And on the trademark claims, I'll just say  
19 this: Live PD or live anything is not cognizable  
20 under the trademark laws; Saturday Night Live, Jimmy  
21 Kimmel Live, Live with Regis and Kelly and then 100  
22 lives since those well known shows. They then say,  
23 well, we misled people to believe that the show was  
24 on the A&E network as the old show. That is not a  
25 plausible allegation on the face of the complaint,

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1 because the people who watched Live PD knew it was  
2 canceled by A&E because Live PD was off the air for  
3 two years before the new show was on Reelz. And  
4 that was known because it was displayed prominently  
5 on the very advertising that they say is misleading.

6 In fact, the irony here is they had to know  
7 and understand the shows are coming from different  
8 sources to even find the shows on the channel to  
9 begin with. And so the parties had every incentive  
10 to make clear to audiences that this was coming from  
11 a different source. And it's confusion as to  
12 source, which is the talisman of a sustainable  
13 trademark claim. And we'll cite cases and show,  
14 Your Honor, why, as a matter of law, the complaint  
15 fails to state a viable trademark claim, and then  
16 the unfair competition claim is preempted by the  
17 Copyright Act, and we think that goes as well.

18 So --

19 THE COURT: All right. If you can pause,  
20 Mr. Snyder. Thank you.

21 I guess you began -- you ended where you  
22 began by speaking about the contract, and I wanted  
23 to explore that with you a little bit more. I  
24 didn't understand you to be suggesting that the  
25 contract itself somehow undercut or affected the

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1 strength or the viability of any claims of copyright  
2 infringement that A&E might have. But maybe that is  
3 what you're saying, because what you do is you began  
4 by saying, look, contract, and contract says we can  
5 do something substantially similar in form and  
6 content which is evocative of copyright law. And  
7 then you go -- and then you start talking about  
8 whether certain things are copyrightable or whether  
9 they amount to a viable claim of infringement.

10 So I guess I'd like to understand a little  
11 bit more. What impact do you believe the contract  
12 has on what otherwise would have been the copyright  
13 protections that A&E had?

14 MR. SNYDER: Excellent question and I'm  
15 sorry for the confusion. We believe without the  
16 contract, meaning, if there were no one-year  
17 exclusivity period and we went out and sold the show  
18 the day -- on the last day of the A&E show, we would  
19 be before the Court making these exact same  
20 arguments. So it does not impact the copyright law  
21 analysis. But because the plaintiffs embedded the  
22 contract and the context into the case and we think  
23 distorted some of the terms of the contract, we  
24 wanted to provide the Court with the contract which  
25 is incorporated by reference now in the complaint as

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1       helpful context of what's happening here. So it's  
2       simply context factual background and frankly, to  
3       give the Court comfort that the commercial reality  
4       underlining this as a matter of context and  
5       background is perfectly symmetrical with the legal  
6       outcome of the copyright analysis.

7                   So just to be clear, the contract doesn't  
8       help or advance directly our motion to dismiss which  
9       is based on Walker and its progeny but provides  
10      valuable context for the Court to understand really  
11      what's going on here.

12                  THE COURT: All right. Now separately each  
13      of you has focused on the way in which Big Fish made  
14      mention or attempted to draw a connection at least  
15      as alleged between the prior show and the current  
16      show; the former show being Live PD and the current  
17      one being On Patrol Live.

18                  And I guess to listen to plaintiff's  
19      counsel, the very fact that this connection was  
20      drawn is what shows or what bolsters the  
21      infringement claims that they wish to bring. To  
22      you, actually, you were sort of using it as a sword  
23      by saying no, no, no, it confirms that it -- it  
24      dispelled any confusion that might arise because it  
25      made clear that the one show was over and that there

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1 was going to be a new show on another network. But  
2 perhaps you could help me understand that a little  
3 bit better.

4 MR. SNYDER: Yes. First, I want to say as  
5 a framing, A&E has said to Your Honor in its letter  
6 that likelihood of confusion analysis doesn't lend  
7 itself to a motion to dismiss and courts in this  
8 district routinely dismissed cases for failing  
9 adequately or plausibly to allege likelihood of  
10 confusion, and the recent cases -- there's a Nike  
11 case that we cite. And we believe that if you go  
12 through the Polaroid factors which we're all  
13 familiar with, the trademark claim just strikes out  
14 on -- although I think they're eight, so that would  
15 be two strikeouts and two strikes, so two outs with  
16 two strikes. The mark is not strong. The only  
17 similarity in the two marks is the word "live,"  
18 which obviously is generic. And what the instances  
19 of alleged confusion in the complaint actually show  
20 to you -- the point Your Honor just made in  
21 summarizing my argument, the alleged confusion cited  
22 in the complaint is a sword because it shows that  
23 audiences understood these shows were, in fact,  
24 coming from two networks, two different networks.  
25 And even with the alphabet soup and morass of our

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1 screens these days, where we have 100 channels on  
2 three screens across our television, the source of  
3 confusion analysis does look to what -- under the  
4 Polaroid factor, what a reasonable viewer would  
5 discern. And people who watch Live PD would  
6 discern, since it was clicked on their A&E button,  
7 that it was aired by A&E. Two years later, it shows  
8 up on Reelz. And in order to see it on Reelz, you  
9 have to find it on Reelz and push the Reelz button.  
10 So a consumer had to understand the source of the  
11 show Reelz, not A&E in order to even watch it.

12 So we believe that if you plug in the  
13 Polaroid factors, which we didn't do in our letter,  
14 but would in our brief, this is an easy call to  
15 dismiss as a matter of law on the face of the  
16 pleading.

17 THE COURT: All right. Let me please hear  
18 from Mr. Yohai in response. I thank you, Mr.  
19 Snyder. Mr. Yohai?

20 MR. YOHAI: Yes, Your Honor. You know, as  
21 we allege in paragraph 62 of the complaint, the  
22 consumers are saying themselves that they're  
23 confused. They say, okay, I'm confused. Is Live PD  
24 back on the air, if so, how do I watch it? They say  
25 Live PD is back. They say Live PD returns tonight.

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1 That's our show, Live PD. So when Mr. Synder says  
2 they're not confused, they know where it is and  
3 where to find it, and then it's a different show. I  
4 don't believe that's the case.

5 In addition, if you look at paragraph 48 of  
6 our complaint, which is one of the advertisements  
7 that Reelz put forth, it says, PD Live is now on  
8 Reelz with all new live episodes. PD Live, that was  
9 the reverse of our name, Live PD is on Reelz with  
10 all new live episodes. So they are trading on this,  
11 saying that they are making new episodes of our  
12 show.

13 Mr. Snyder brought up, you know, Project  
14 Runway. I'm actually familiar with that situation.  
15 And unlike this situation, there was an agreement  
16 when that moved. It wasn't that they just took the  
17 show and put it on their network and used our  
18 copyrights for free. So I don't know what relevance  
19 that is. And he may be right that shows move, but  
20 they move when there are agreements and licensing or  
21 a contract terminates, none of which happened here.  
22 And so, because we have the copyrights in  
23 perpetuity, there would have to have been an  
24 agreement, which is, by the way, why there was a  
25 business discussion about what we should receive for

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1       this, which was abruptly ended saying they would not  
2       make us any proposal, and then they went ahead and  
3       did it anyway. And so the notion that we're not  
4       entitled to compensation for what has happened here,  
5       I think his client even knows that that's probably  
6       not right.

7                  THE COURT: I want you -- sir -- sir, I  
8       want you to stop right there. First of all, I'm not  
9       interested in pre-litigation discussions about  
10      avoiding litigation. Second of all, I'm also not  
11      going to be making a determination that something is  
12      or is not a viable claim based on whether the  
13      parties, for any number of reasons, wanted to avoid  
14      litigation. So I think -- I don't think that's the  
15      hook on which you want to hang your arguments to me.  
16      Why don't you move on to something else?

17                 MR. YOHAI: Okay, your Honor. I appreciate  
18      that. The only reason that I raised it was because  
19      defense counsel brought up Project Runway and  
20      suggested that that had relevance to this case,  
21      where it really doesn't, given the situation here.  
22      So I would suggest perhaps that neither has  
23      relevance. But that's why I was responding on that  
24      point.

25                 THE COURT: I don't -- I don't see -- all

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1 right. And I'll just end the discussion by saying I  
2 don't see how what happened to Project Runway  
3 matters to what happened in this case. I do think  
4 you were trying to poison the well. The well is not  
5 poisoned. Again, sir, please move on to another  
6 argument.

7 MR. YOHAI: Okay. Well -- okay. Thank  
8 you, your Honor. I will.

9 So in any event, your Honor, with respect  
10 to the points that I was making, the consumers have  
11 spoken as to their confusion. I don't need to  
12 create the evidence. The evidence is there, and  
13 it's cited in our complaint.

14 In terms of what else I can say about the  
15 confusion point, it is clear that they engaged in a  
16 marketing campaign to deliberately try to confuse  
17 the shows, which is why they went out to the  
18 marketplace, and we're saying it was back. And  
19 that's in spades in the complaint. It's in spades  
20 in pictures, it's in spades in things attached to  
21 the complaint, which your Honor can read for  
22 herself. So I won't need to repeat all of that.

23 So I think the confusion is evident from  
24 what I've already gone through. And again, that's  
25 not me saying, it's the consumers themselves saying

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1 it.

2 THE COURT: Let's just hypothesize for a  
3 moment that there is out there some easily confused  
4 consumer who is confused because of an element that  
5 is not protectable. Are you still saying that you  
6 have a viable claim even if the confusion arises  
7 from non-protectable elements? I appreciate your  
8 telling me that, oh, no, no, no, everything I've  
9 been talking to you about is protectable. But I'm  
10 just trying to make sure I understand precisely how  
11 consumer confusion warrants my consideration in any  
12 motion.

13 MR. YOHAI: Your Honor, I understand your  
14 question. I would be hard pressed to tell you that  
15 if something was not at all protectable, that could  
16 be a basis in and of itself to create a claim, I  
17 think under either of the statutes. Having said  
18 that, as your Honor already alluded to, we do think  
19 the elements are protectable, one example of which  
20 is when the defendants, for example, mention the  
21 Missing. Missing is a stock concept. Well, it may  
22 be -- but when they cut to the same person at the  
23 National Center for Missing People, rather than  
24 doing something else, when they cut to the exact  
25 same person to do the same thing, it starts to look

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1 and feel a little bit like well, this is exactly the  
2 same. And that's how you, as your Honor said in her  
3 case, you collect and arrange the elements. And  
4 that's why, you know, we think when you look at the  
5 collection and arrangement and coordination of the  
6 elements here, it is protectable. And that's also  
7 why there is this confusion, because when people  
8 watch the show, they also are confused. And, you  
9 know, quite frankly, some of them, I think, have  
10 said, as I said, even after watching the show, it's  
11 great that Live PD is back on the air again.

12 So, you know, to me, again, they've put it  
13 on their network. This isn't our network. But  
14 that's exactly the problem here. You can't take  
15 what we've created, intentionally confuse people  
16 into thinking it's the same show, and then claim it  
17 for your own. That's the problem.

18 THE COURT: Do you believe you'd still have  
19 these claims even if there weren't what you  
20 described as efforts made to suggest a continuation  
21 from Live PD to On Patrol Live?

22 MR. YOHAI: Your Honor, we considered very  
23 carefully whether to bring this case. And so I  
24 think if several of these elements were not present,  
25 we wouldn't have brought the case. I think here,

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1 because of all of the factors, meaning that they did  
2 try to trade on our show, plus the extreme  
3 similarity -- you know, I could go on, they are  
4 using the same director, for example. When I heard  
5 about from defense counsel about how well live  
6 action is not something that's new original. The  
7 director, John Gonzalez, he was the director of some  
8 of our Super Bowls, and they did have a unique way  
9 of putting together this particular live action,  
10 which is part of the look and feel of the show.

11 So, again, to answer your question  
12 directly, if all of the factors were not present, we  
13 probably wouldn't have brought the case. But since  
14 they did trade on our name and put that together  
15 with all the similarities, we did bring the case.

16 THE COURT: All right. Thank you.

17 Mr. Snyder, my suspicion is there that I am  
18 unable to dissuade you from bringing the instant  
19 motion. Am I correct?

20 MR. SNYDER: Most respectfully, you are  
21 correct, Judge.

22 THE COURT: All right. Thank you.

23 Sir, how much time would you like,  
24 recognizing that I'm not interested in destroying  
25 your associates Thanksgiving, to file your opening

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1 brief?

2 MR. SNYDER: I'm looking at my sad victim  
3 right now, Ilissa and James. How about -- what's  
4 today, October 27th? Could we file it, given the  
5 Thanksgiving week, on December 9th?

6 THE COURT: Yeah. That's actually the date  
7 I was looking at.

8 MR. SNYDER: All right.

9 THE COURT: Okay. Thank you.

10 And, Mr. Yohai, again, recognizing that  
11 there are some holiday observances in all of this.  
12 May I have your response by January 20?

13 MR. YOHAI: Yes, that's reasonable, your  
14 Honor.

15 THE COURT: Thank you. All right.

16 And then can I have the reply by  
17 February 3rd, Mr. Snyder?

18 MR. SNYDER: Yes, of course. Thank you.

19 THE COURT: Okay. All right.

20 MR. YOHAI: Your Honor --

21 THE COURT: Yes. May I ask who's just now  
22 speaking?

23 MR. YOHAI: Yes, this is Mr. Yohai. May I  
24 ask a question?

25 THE COURT: Thank you. Of course, sir.

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1                   MR. YOHAI: We're assuming that this is one  
2 brief. There are obviously three defendants, but we  
3 just wanted to make sure we understand what we're  
4 getting.

5                   THE COURT: Oh, yes. That's fair enough.  
6 I understood one brief. I also understood one brief  
7 within the page limit. So though, at some point,  
8 I'm confident Mr. Snyder is going to try and change  
9 that.

10                  MR. SNYDER: Maybe. Maybe.

11                  THE COURT: I wouldn't ask. I think you  
12 should try and get it within the 25 pages. And --  
13 go ahead, Mr. Snyder. Please finish your thought.

14                  MR. SNYDER: We had one further request,  
15 which is that because we believe this case should be  
16 dismissed in full on the pleadings, we believe that  
17 a short stay of discovery while the Court resolves  
18 our motion makes the most sense for the Court and  
19 the parties for all the obvious efficiency reasons.  
20 And I'm very confident that Weil, Gotshal and Gibson  
21 Dunn, if the motion dismissed is denied and the case  
22 continues, can make up for lost time and promptly  
23 and efficiently embark on discovery without any  
24 prejudice to anyone, we believe there's good cause  
25 for a stay. And I can argue it, but I'm hoping my

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1 colleague on the other side will agree that putting  
2 the pause on discovery until the first quarter of  
3 next year, if the case survives, makes sense.

4 For example, Amy's first set of requests  
5 for production, Judge regrettably and painfully  
6 include 288 requests to the three defendants  
7 combined. So that would be like 1,000 -- oh, 50  
8 each. And then six days ago, we got 56  
9 interrogatories. And leaving aside the sheer number  
10 of requests at this early stage, they're overbroad.  
11 We're going to need to have discovery litigation  
12 before we narrow them. And I'm happy to tell you  
13 how broad and unreasonable they are, but there's  
14 really no prejudice here at all. There's no  
15 injunction request, et cetera, et cetera.

16 THE COURT: Okay. Mr. Yohai, as a matter  
17 of practice, for the past nine and three quarter  
18 years, I have stayed discovery where the  
19 contemplative motion would be fully dispositive.

20 Sir, I'll hear from you if you think I  
21 should make this one exception, but I did want you  
22 to know, if you weren't familiar with my individual  
23 practices, that that is something I do as a matter  
24 of course.

25 MR. YOHAI: I appreciate that, your Honor.

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1 I was not aware that that was your consistent  
2 practice. I would just say a couple of things.  
3 One, to the extent that the defendants are relying  
4 upon the contract, it couldn't possibly be  
5 dispositive against two out of the three defendants  
6 since they're not party to the contract. I  
7 recognize that their arguments as to the other  
8 elements are arguably dispositive, if they're  
9 successful. I don't think there would be any harm  
10 in exchanging document request. Sounds like we're  
11 going to have a lot of issues about what is and is  
12 not broad -- or not broad. I would say that it is  
13 not anywhere near 1,000. It was 288 combined for  
14 the three defendants, and many of them are similar.  
15 And so I would suggest we exchange at least the  
16 document requests and get started on what the  
17 objections are going to be in parallel, so there is  
18 no delay. And, you know, I don't know how long Your  
19 Honor will have to work on this and the Court's  
20 schedule, but it seems to me we could do certain  
21 things at least, and get the case moving without a  
22 whole lot of delay. At least it would help.

23 THE COURT: All right. Mr. Snyder, would  
24 you just speak to the very limited issue of Mr.  
25 Yohai's argument that your motion, however

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1       thoughtfully it is presented, could not be  
2       dispositive as to the two of three defendants who  
3       were not signatories to the agreement?

4                    MR. SNYDER: Yeah. There are three claims.  
5       As I understand it, there's a copyright claim  
6       against all three defendants, a trademark claim  
7       against all three defendants, and an unfair  
8       competition claim against all three defendants. We  
9       believe our motion, if granted, will dispose of all  
10      three claims against all three defendants,  
11      irrespective of who's a party to the contract. For  
12      the reasons I said earlier, the contract is context  
13      and background, not an actual basis for dismissal.

14                  THE COURT: All right. At this time, I am  
15      going to keep my consistent practice of ordering the  
16      stay. So discovery is stayed pending further order  
17      of the Court, and I certainly recognize the party's  
18      desire to move this case forward. Hopefully, my  
19      schedule won't get in the way, but we'll see about  
20      that.

21                  We will be entering a minute entry, and  
22      you'll be receiving that electronically that  
23      reflects these dates. From my perspective, these  
24      were the issues that I did want to address in this  
25      proceeding.

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1                   Mr. Yohai, is there anything else that you  
2 or your colleagues would like to bring to my  
3 attention this morning?

4                   MR. YOHAI: No, Your Honor. We thank you  
5 for your patience.

6                   THE COURT: Thank you very much, sir, for  
7 yours.

8                   And, Mr. Snyder, from you and your team, is  
9 there anything else to discuss today?

10                  MR. SNYDER: No, Your Honor. And as  
11 always, thank you for your time and consideration.  
12 We appreciate it.

13                  THE COURT: All right. Well, I thank you  
14 all. I'm wishing you all continued safety and good  
15 health during this pandemic and happy holidays to  
16 the extent we won't be speaking before then. Thank  
17 you. We are adjourned.

18                  MR. SNYDER: Thank you.

19                  MR. YOHAI: Thank you.

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1                   C E R T I F I C A T E

2  
3                   I, Marissa Mignano, certify that the foregoing  
4 transcript of proceedings in the case of  
5 A&E Television Networks, LLC v. Big Fish  
6 Entertainment, LLC, et al., Docket #1:22-cv-07411-KPF,  
7 was prepared using digital transcription software  
8 and is a true and accurate record of the proceedings.

9

10

11 Signature Marissa Mignano

12                   Marissa Miganano

13

14 Date:           12/15/22

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